RE KARISMA THAKURDAS JETHWANI; EX P MALAYAN BANKING BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[CIVIL SUIT NO: 29-6081-10-2012]
21 SEPTEMBER 2015

BANKRUPTCY: *Notice – Setting aside – Appeal against decision of Senior Assistant Registrar – Dispute over computation of interest on amount of monies owed – Whether must be notified via bankruptcy notice – Whether letter constituted notice – Whether s. 3(2)(ii) of Bankruptcy Act 1967 complied with*

LIMITATION: *Execution of judgment – Limitation of 12 years – Bankruptcy proceeding instituted six years after date of judgment – Parties entered into negotiation and agreed not to raise issue of limitation – Dispute arose over computation of interest on amount of monies owed – Whether limitation had set in – Whether judgment creditor could claim interest beyond six years after judgment – Whether judgment debtor estopped from relying on law regarding limitation – Limitation Act 1953, s. 6(3)*

The judgment debtor ('JD') in the present appeal owed the judgment creditor ('JC') some monies. Six years after the date of judgment was obtained against the JD, the JC instituted bankruptcy proceedings against the former. Long after the six years had set in, the JD negotiated with the JC on the outstanding amount owed and the JD agreed not to raise the issue on limitation of claim. The JD disputed the computation of interest by the JC on the amount owed and applied to set aside the bankruptcy notice ('BN') issued by the JC. The Senior Assistant Registrar allowed the application and hence, the present appeal. The JC submitted that even if the interest was wrongly claimed in the BN, the JD must issue a notice informing the JC of the alleged mistake, pursuant to s. 3(2)(ii) of the Bankruptcy Act 1967 ('the Act'), which was not done by the JD. The issues that arose for the determination of the court were (i) whether the JC could claim interest beyond six years after judgment was obtained against the JD; (ii) whether the JD was estopped from relying on the law regarding limitation in respect of the interest claimed by the JC; and (iii) whether a notice had been presented by the JD to satisfy s. 3(2)(ii) of the Act.

Held (dismissing appeal):

(1) The JC could not claim interest beyond six years from the date of judgment. Therefore, the BN issued by the JC was defective, wrong and excessive. Section 6(3) of the Limitation Act 1953 ('Limitation Act') applied to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of judgment. (paras 9 & 10)

(2) The JC could not rely on the agreement of the JD not to bring the issues of limitation in the claim made by the JC. The JD had no obligation to meet the demand stated in the BN. There was no estoppel that comes to play to estop the operation of the law. Parties cannot disagree to what is provided by the law. They cannot contract out of the statute. More so when in this case, the provision of s. 6(3) of the Limitation Act is very clear. The cases relied on by the JC could not be authorities to allow estoppel. (paras 11, 12, 17 & 20)

(3) There was in fact a notice issued by the JD disputing the amount claimed in the BN *vide* a letter to the JC. The JC did not dispute the issuance of the letter and had in fact acknowledged receiving the same. The letter was a notice pursuant to s. 3(2)(ii) of the Act and the JD had then complied with the provision. In addition, s. 3(2)(ii) of the Act stated the notice required is to point out the mistake in the amount actually due. However, what was sought to be done by the JC was clearly to claim for what it was not entitled to in law. The unauthorised claim was not the fault of the JD and the JD had no duty to alert the JC that it could not be so claimed. It was a travesty of justice if the JD was required to give (another) notice. (paras 22, 23 & 24)

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(not foll)***

Citibank Bhd v. Classic Lane (M) Sdn Bhd [2005] 7 CLJ 201 HC ***(refd)***

Fu Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd [1989] 2 CLJ 296; [1989] 2 CLJ (Rep) 913 HC ***(refd)***

Ho Yoke Kwei & Anor v. Ong Eng Hin [1997] 1 CLJ 603 HC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125 HC ***(foll)***

Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***

Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(not foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(2)(ii)

Limitation Act 1953, s. 6(3)

For the appellant/JC - SM Lim (YH Loke with him); M/s Raja Darryl & Loh
For the respondent/JD - Tejindar Pal; M/s Vin Partnership

Reported by Najib Tamby

JUDGMENT

Abu Bakar Jais JC:

Introduction

[1] This is an appeal against the decision of the learned Senior Assistant Registrar ("SAR") who had allowed the application of the judgment debtor ("JD") to essentially set aside the bankruptcy notice ('BN') issued by the judgment creditor ("JC").

Material Facts

[2] It should be pointed out that the material facts narrated here are sufficient to address the crucial issue that determines the outcome of this appeal. The material facts narrated here is shorn of unnecessary details that are not needed to explain the reasons for this decision of the appeal.

[3] There is no dispute that the JD owes the JC some monies. The JC therefore instituted bankruptcy proceeding based on a court judgment obtained. What the JD is disputing is the computation of interest by the JC on the amount owed. There is also no dispute that the bankruptcy proceeding was taken after six years from the date of judgment obtained ie, 17 November 2000 against the JD. There is also no dispute that the JC instituted bankruptcy proceeding within 12 years as required.

[4] Long after the six years had set in (letter of settlement dated only on 22 September 2008), the JD negotiated with the JC on the outstanding amount owed and the JD most importantly had agreed not to raise issue on limitation of claim in this negotiation. Since this was agreed, the JC submitted the JD cannot rely on the defence of limitation in respect of the interest claimed beyond six years.

[5] The JC also contended even if the interest is wrongly claimed in the BN, the JD must issue a notice informing the JC of the alleged mistake pursuant to s. 3(2)(ii) of the Bankruptcy Act 1967. The JC says this was not done by the JD.

Court's Observation

[6] Based on the above facts, there are three issues that can be discerned. These are:

(a) whether JC can claim interest beyond six years after judgment was obtained against the JD;

(b) whether the JD is estopped to rely on the law regarding limitation in respect of the interest claimed by the JC; and

(c) whether a notice has been presented by the JD to satisfy s. 3(2)(ii) of the Bankruptcy Act 1967.

Decision On First Issue: Interest That Can Be Claimed

[7] The JD submitted the JC can only claim interest until 16 November 2006 from the date of judgment on 17 November 2000, a period of six years only and not beyond as what the JC had done as reflected in the BN. The BN claiming interest up till the filing of the same on 31 October 2012 is said to be wrong and excessive.

[8] Section 6(3) of the Limitation Act 1953 states:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[9] Based on the above provision, I agree that the JC cannot claim interest beyond six years from the date of judgment. Therefore, the BN issued by the JC is defective, wrong and excessive.

[10] I would also agree on the explanation regarding the above provision by Abdul Hamid Mohamad FCJ (as he then was) in the Federal Court's case of *Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787; [2004] 3 MLJ 253 that interest cannot be claimed more than six years from the date of judgment as follows:

> ... s. 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of judgment.

Decision On The Second Issue: Estoppel To Deny Limitation

[11] In addition to the first issue as explained, I do not think that the JC can rely on the agreement of the JD not to bring the issue of limitation in the claim made by the JC. Parties cannot agree to what is already provided by the law. They cannot contract out of statute. More so when in this case the provision of s. 6(3) of the Limitation Act 1953 as narrated is very clear.

[12] This court also disagrees with the JC there is estoppel against the JD where the JD agreed not to raise issue of limitation. There is no estoppel that comes to play to estop the operation of the law. The law as explained in s. 6(3) of the Limitation Act 1953 cannot be overridden by the estoppel and likewise the estoppel cannot takes precedence over the statutory provision of the law.

[13] The case *Fu Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd* [1989] 2 CLJ 296; [1989] 2 CLJ (Rep) 913; [1989] 2 MLJ 80 explains whether estoppel can be used against provision of legislature and Grimberg JC in this case said:

> I am also obliged to reject the plea of estoppel, and the related plea of waiver, because it is a general principle that the doctrine of estoppel 'cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted ... to be invalid ...': 16 *Halsbury's Laws of England*, para 1515.

In *Bradshaw v. M'Mullan* [1920] 2 IR 412, the House of Lords held that a contract was void as being contrary to a provision of the Local Government (Ireland) Act 1898. The defendant relied upon certain events as giving rise to an estoppel. The plea was rejected. In the course of his speech, Lord Shaw of Dunfermline said:

> Further, my Lords, I desire to make this observation. I do not see my way to sanction the application of this specific plea of *res judicata*, or the more general plea of estoppel, to any transaction such as the present, which is in plain defiance of statutory injunction. **Such a plea, if allowed, would place the Courts of the country in open conflict with the determination of the Legislature.**
>
> (emphasis added)

[14] I am also after consideration minded to take note and follow the case of *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1990] 2 CLJ 1044; [1990] 2 CLJ (Rep) 125; [1991] 1 MLJ 221 that says:

> The defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since **there can be no estoppel against a statute;** specifically, the various provisions of the Code to which I have referred. So, for example, there can be no estoppel from questioning the validity of a document which is required by law to be registered and is not registered. (See *Mst Kauleshwari Kuer v. Surajnath Rai* AIR 1957 Pat 456.)
>
> (emphasis added)

[15] The other relevant case is the case of *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603; [1997] 4 MLJ 292 which states:

> In any event the objection of learned counsel based on estoppel cannot stand as there can be no estoppel against a statute (see *Foo Loong Lithographer Pte Ltd v. Mun Hean Realty Pte Ltd* [1989] 2 MLJ 80; *Overseas Chinese Banking Corp Ltd v. Eastern Auto Co Ltd* [1961] MLJ 300 and *Chew Geok Lin v. Pau Ping Kwang* [1965] MLJ 25).

[16] Yet another case that illustrates the principle the provisions of statutes should not be overridden by estoppel is the case of *Citibank Bhd v. Classic Lane (M) Sdn Bhd* [2005] 7 CLJ 201; [2005] 6 MLJ 720 where the relevant decision states:

> It is because of these statutory safeguards that the plaintiff's statutory right cannot be defeated by the doctrine of estoppel. For this I refer to *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, where Edgar Joseph Jr held that: the defence of estoppel based on the judgment of Wan Adnan J aforesaid, cannot arise since there can be no estoppel against a statute.

[17] I am aware of the reliance of the JC on the cases of *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202 and *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; [1995] 3 MLJ 141 to say that estoppel can be used by the JC for the BN to be rendered valid and effective.

[18] However, having closely looked at these cases, I am of the considered view that these cases cannot be authorities to allow for estoppel when there is crystal clear statutory provision such as s. 6(3) of the Limitation Act 1953. Estoppel cannot in this regard displace the entrenched provision.

[19] It would be close to mockery of the legislature if all and sundry can agree among themselves not to follow what is already stated as the law of the land. The cold print of the statutory provisions will become useless if liberty is granted for any parties to form a consensus the same should never bind them. It is to say the least, a dangerous precedent to set.

[20] The explanations above both on the law that the JC cannot claim interest beyond six years and the legal position that there can be no estoppel to defeat statutory provisions would mean that the BN is defective and invalid As a consequence, the JD has no obligation to meet the demand stated in the BN.

Decision On Third Issue: Notice Issued

[21] On the notice that must be issued by the JD pursuant s. 3(2)(ii) of the Bankruptcy Act 1967 the provision states:

> A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice-
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice on the creditors that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

[22] First on this issue of notice as required on the JD, this court is of the view there is no reason to dispute the finding of the learned SAR that there was in fact a notice which was issued by the JD disputing the amount claim in the BN *vide* a letter to the JC dated 17 December 2012. The JC did not dispute the issuance of the letter by the JD and in fact the JC acknowledged receiving this letter in its affidavit although disputing the contents of the same.

[23] This court accepts this letter as notice pursuant to the statutory provision as noted above. The provision therefore has been complied by the JD.

[24] In addition, the provision states the notice required is to point out the mistake in the amount actually due. However, here what is sought to be done by the JC is clearly to claim what it is not entitled in law as explained earlier

in the judgment. This blatant unauthorised claim is not the fault of the JD to alert the JC that it cannot be so claimed. The burden should never be cast on an innocent party to issue that notice against a party who had in all probability wanted to take advantage on the ordinary JDs who might not be aware of his or her rights that such claim is actually not legally allowed. The facts of this case would show that it is a travesty of justice if the JD is still required to give the notice.

Conclusion

[25] There is no doubt that interest cannot be claimed beyond six years as demanded in the BN. Further, there are decided cases that reiterated the well-established principle that estoppel cannot bar the operation of statutes. On the notice required to be issued pursuant s. 3(2)(ii) of the Bankruptcy Act 1967, the facts of the case reveal such notice indeed had been issued by the JD.

[26] For all the reasons explained, the appeal of the JC is dismissed with costs.